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No. 00-2

In The

Supreme Court of the United States

STEPHEN AMELKIN; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD,

Petitioners,

v.

ANN McCLURE; Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; and BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

AND

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The challenged state statute prohibits production of motor vehicle accident reports to persons who intend to use the information contained in the reports to engage in commercial speech, while at the same time allows unlimited production of the same reports to persons who do not intend to use them to engage in commercial speech, including "news-gathering organizations." The question presented is whether the state's discrimination against commercial speakers violates the First Amendment rights of those speakers, particularly since its stated rationale for treating commercial speakers differently is an interest in protecting the privacy of persons who are the subject of the reports and this rationale is undermined and counteracted by the exception for the media which may inspect and report on the information contained in the reports.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

None of the Petitioners are corporations, and, therefore, there are no parent companies or non-wholly owned subsidiaries of any Petitioner.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
CITATION TO OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
I. Procedural history of the case	4
II. Factual Background	5
REASONS FOR GRANTING THE WRIT	11
I. The circuit courts of appeal and state courts of last resort are irreconcilably divided on this frequently recurring question of federal law	11
II. Petitioners' challenge to the Kentucky statute was not a facial attack made on overbreadth grounds but as it applied to them and, therefore, there is no procedural bar to this Court's review of the Sixth Circuit's decision that the statute is unconstitutional	16
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Amelkin v. Commissioner, 936 F.Supp. 428 (W.D. Ky. 1996) 1, 7, 13

Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999) ..... *passim*

Amelkin v. McClure, 205 F.3d 293 (6th Cir. 2000) ... 1, 5, 20

Babkes v. Satz, 944 F.Supp. 909 (S.D. Fla. 1996) 12

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) ... 8, 10, 17

DeSalvo v. Louisiana, 624 So.2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994) 13

FEC v. International Funding Institute, 969 F.2d 1110, *cert. denied*, 506 U.S. 10001 (1992) 14

FEC v. Political Contributions Data, 943 F.2d 190 (2d Cir. 1991) 14

Innovative Data Base Systems v. Morales, 990 F.2d 217 (5th Cir. 1993) 12, 13

Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994) 12, 13

LaSalle v. Udell, Case No. 94-O404-M, unpublished opinion and order (D.N.M. February 16, 1996) 12

Los Angeles Police Dep't v. United Reporting Publishing Corp., 528 U.S. ___, 145 L.Ed.2d 451, 120 S.Ct. 483 (1999) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 16, 17

Moore v. Morales, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996).....12, 13

New Orleans Broadcasting v. United States, 527 U.S. 173 (1999)..... 14

Rubin v. Coors Brewing, 514 U.S. 476 (1995).....9, 10

Ryan v. Kirkpatrick, 669 S.W.2d 215 (Mo. 1984)..... 14

Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994).....12, 13

Statewide Detective Agency v. Miller, No. 96-CV-1033 (WBH), Order (N.D. Ga. August 12, 1998)..... 12

Thornhill v. Alabama, 310 U.S. 88 (1940).....16, 17

United Reporting Publishing Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998) 12

Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997)..... 10

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 17

CONSTITUTION

First Amendment..... *passim*

Fourteenth Amendment..... 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 2

KRS 61.874 7

KRS 189.635 ..... *passim*

ATTORNEY GENERAL OPINIONS

Kentucky Attorney General Opinion 89-76..... 6

Kentucky Attorney General Opinion 94-ORD-145 19

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit on remand from the United States Supreme Court is reported at 205 F.3d 293, and is reprinted in the appendix to this petition at 1a.

The opinion of the United States Supreme Court granting the writ of certiorari of Ann McClure, et al., and vacating the decision of the Sixth Circuit Court of Appeals on appeal from the United States District Court for the Western District of Kentucky is reported at 120 S.Ct. 630, and is reprinted in the appendix to this petition at 8a.

The decision of the Sixth Circuit Court of Appeals on the second appeal from the United States District Court for the Western District of Kentucky ("Amelkin II") is reported at 168 F.3d 893, and is reprinted in the appendix to this petition at 9a.

The second opinion of the United States District Court for the Western District of Kentucky is reported at 936 F.Supp. 428 and is reprinted in the appendix to this petition at 47a.

JURISDICTION

On December 13, 1999, the United States Supreme Court granted the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for review of that Court's decision entered February 17, 1999, and vacated and remanded the Sixth Circuit's Judgment.

On February 24, 2000, the Sixth Circuit reversed the decision of the United States District for the Western District of Kentucky. Petitioners filed a timely Petition for Panel Rehearing on March 9, 2000, which the Sixth Circuit denied on March 30, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statute involved in this case is KRS 189.635(5-6). Petitioners have reproduced the full text of

the statute in the appendix, p. 69a, and provide the portions of the statute relevant to the Petition here.

KRS 189.635(5) provides in pertinent part:

> All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is a party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

KRS 189.635(6) provides in pertinent part, as follows:

> The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for commercial purpose merely because of its publication or broadcast.

STATEMENT OF THE CASE

I. Procedural history of the case.

This case has previously been before this Court on a Petition for a Writ of Certiorari filed by the Respondents seeking review of the Court of Appeals for the Sixth Circuit's affirmance of the district court's injunction against enforcement of a Kentucky statute as an unconstitutional infringement of the Petitioners' First Amendment right to freedom of expression. *Amelkin v. McClure*, 168 F.3d 893, 902 (6th Cir. 1999).

While this case was pending on Respondents' Petition, on December 7, 1999, this Court reversed the ruling of the Ninth Circuit Court of Appeals in *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. ___, 145 L.Ed.2d 451, 120 S.Ct. 483 (1999), that a statute comparable to the Kentucky statute under review here unconstitutionally infringed the First Amendment commercial speech rights of the plaintiff in that case. On December 7, 1999, this Court reversed that decision as an improper facial challenge to a restriction on commercial speech. *Id.* Without addressing the merits of the claims or the procedural history of this case, and without finding that Petitioners here had similarly made a facial challenge to the Kentucky statute in issue, on December 13, 1999, this Court granted the petition for a writ and remanded this case to the Sixth Circuit "for further consideration in light of" *United Reporting Publishing*. Appendix at page 8a (hereafter "App. at ___").

On February 24, 2000, the Sixth Circuit reversed the district court's decision on the grounds that the statute in

issue is not subject to a facial challenge. *Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000). In reaching this decision, the Sixth Circuit determined that the "district court only addressed the plaintiffs' facial challenge, as indicated by the fact that it permanently enjoined the state of Kentucky from enforcing KRS § 189.635,. . . . " *Id.*

Petitioners moved the Sixth Circuit for panel rehearing on the grounds that they had **not** made a facial challenge to the statute. Unlike the plaintiff in *United Reporting*, which was a publishing service that had challenged a California statute on behalf of its "potential customers" who would use the information to which they were denied access to sell a product or service, the Petitioners here are the "potential customers" whose speech is directly restricted by an analogous Kentucky statute.

The Sixth Circuit denied, without opinion, the Petition for Panel Rehearing on March 30, 2000.

II. Factual Background

Petitioners are attorneys, chiropractors and the publisher of a proposed newsletter which would, among other things, publish information gathered from traffic accident reports. Petitioners filed this action in 1994 to challenge newly-enacted amendments to two Kentucky statutes. The amendments to KRS 189.635 prohibit the disclosure of traffic accident reports to anyone other than parties to the accident, the insurer of any party who is the subject of the report, or to the attorneys of the parties. An exception to this restricted access allows disclosure of reports to "news-gathering" organizations, which are

themselves restricted to using them for the purpose of publishing or broadcasting the news. KRS 189.635.

Prior to enactment of these amendments, all accident reports filed by law enforcement officers and agencies were not considered confidential and were open records obtainable by any individual under Kentucky's open records law. Kentucky Attorney General Opinion 89-76. Accordingly, the attorney and chiropractor Petitioners had routinely obtained copies of the reports and "would use the information contained therein to contact victims and offer their services, . . . " *Amelkin v. McClure*, 168 F.3d 893, 895 (6th Cir. 1999) (*"Amelkin II"*). The Petitioner publisher had "in the past made a business out of assisting these attorneys and chiropractors by supplying them with the accident reports that he ha[d] obtained from law enforcement agencies" and "intend[ed] to publish a newspaper, The Accidental Journal, that [would] contain copies of accident reports and that [would] be marketed primarily to attorneys and chiropractors." *Id.*

The Kentucky General Assembly enacted the amendments to KRS 189.635 "[i]n an attempt to protect accident victims from being hounded by unwanted solicitations from attorneys and chiropractors" like Petitioners. *Id.* at 896. "Almost immediately after passage" of the amendments, Petitioners filed suit "in an effort to enjoin enforcement of the statutes. They claimed that the statutes infringe on their First Amendment right to freedom of expression. Following a lengthy hearing, the district court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment."

Id. at 897.[1] After reviewing the evidence, which demonstrated that the intent of the statute was to prevent commercial speech, the district court found the amendments unconstitutional.

> [I]t is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the state asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers.

Amelkin v. Commissioner, 936 F.Supp. 428, 431 (W.D. Ky. 1996).

On appeal, the Sixth Circuit affirmed. It found that the restriction on news-gathering organizations' use of the reports was a "content-based restriction with respect

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[1] In the district court, Petitioners had also challenged the constitutionality of KRS 61.874, which permits Kentucky to charge a fee for providing copies of records to "persons who intend to use them for a commercial purpose." KRS 61.874. Petitioners had argued that Kentucky's interpretation of the statute as allowing it to charge a fee so greatly in excess of the normal fee charged for copies as to make access to the records economically prohibitive was unconstitutional. Because the district court enjoined enforcement of KRS 61.874 without making findings of fact or conclusions of law, the Sixth Circuit reversed and remanded that decision for further proceedings. Petitioners do not assert error in that decision.

to news organizations which makes § 189.635 fatally flawed." *Id.* at 897. The Sixth Circuit concluded that the statute unconstitutionally regulated the commercial speech of the Petitioners because the "speech at issue is neither illegal nor misleading." *Id.* at 898. The Sixth Circuit rejected the Respondents' argument that KRS 189.635 was constitutional as a "pure denial of access statute," concluding that the statute "is not as benign as the defendants would have us believe." *Id.* at 897. Instead, the Sixth Circuit determined that the Section 6 restriction on a " 'news-gathering organization' from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report" was a "content-based restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.*

Applying this Court's test for analyzing the constitutionality of government regulations limiting commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Sixth Circuit found that the Respondents' asserted interest in protecting "accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public," was "substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion." *Amelkin II*, 168 F.3d at 898. However, the Sixth Circuit found that the amended statute did not directly and materially advance that interest in protecting the privacy and safety of accident victims. First, the Sixth Circuit noted that the Respondents

> provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences. . . . This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech.

Id. at 899, *citing Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995).

The Sixth Circuit found the Respondents' second argument in support of this statute ("to prevent the direct and unnecessary intrusion into the private lives of accident victims") to be

> at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. . . . The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim that the statute is actually intended to protect the privacy interest of accident victims.

Amelkin II, 168 F.3d at 899. The Sixth Circuit concluded that "the exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and

materially advancing the government's purported privacy interest." *Id., citing Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997).

> There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. . . . The exceptions to § 189.635 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*.

Amelkin II, 168 F.3d at 900.

The Sixth Circuit also addressed Respondents' claim "that the statute still advances the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided." *Id.* at 901. The Sixth Circuit noted that "[n]othing in this statute . . . requires that state agencies redact such information from accident reports" and that there was nothing in the statutory language of Kentucky's open records law "compelling the custodian of accident reports to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity." *Id.* at 901.

REASONS FOR GRANTING THE WRIT

I. The circuit courts of appeal and state courts of last resort are irreconcilably divided on this frequently recurring question of federal law.

This Court should grant certiorari to resolve the well-recognized division in the lower courts over whether, under the First Amendment, the government may discriminate in its release of police reports on the basis of whether they will be used to engage in commercial or non-commercial speech. Four circuit courts of appeals have determined that such statutes unconstitutionally infringe on the First Amendment rights of requestors of such records. One circuit court has found such measures to be constitutional, along with the court of last resort of two states. In granting the petition of the Los Angeles Police Department, this Court recognized the split of opinion existing in the lower courts and the need to address and resolve the issue. Both the conflict and the need still exist.

The Sixth Circuit's procedural retreat from its decision in this case did not depart from its finding on the merits that the Kentucky statute is an unconstitutional violation of Petitioners' First Amendment rights. The Sixth Circuit is supported in this decision by the Ninth Circuit Court of Appeals' decision in *United Reporting* (reversed on procedural grounds) that exceptions in a similar statute to production of records for non-commercial speech uses "render the statute unconstitutional under the First Amendment." *United Reporting*, 528 U.S.

___, 145 L.Ed.2d at 458, *quoting United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133, 1140 (9th Cir. 1998).

Similarly, in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), the Eleventh Circuit found a comparable statute unconstitutional in that "any privacy arguments the state asserts are disingenuous in light of the fact that the statute carves out an exception for the media to place any information they obtain on the front page of any newspaper in Georgia." *Id.* at 1011 n.7. This conclusion was also reached by the Fifth Circuit in *Innovative Data Base Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993). District courts have struck down similar statutes enacted in Georgia, Texas, Florida, and New Mexico. *Statewide Detective Agency v. Miller*, No. 96-CV-1033 (WBH), Order (N.D. Ga. August 12, 1998); *Babkes v. Satz*, 944 F.Supp. 909 (S.D. Fla. 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996); *LaSalle v. Udell*, Case No. 94-O404-M, unpublished opinion and order (D.N.M. February 16, 1996).

On the other hand, the Tenth Circuit has reached the opposite conclusion, finding in *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994), that a Colorado statute allowing the release of law enforcement records except to those who would "use them for the purpose of soliciting business for pecuniary gain" was constitutional because it did "not completely ban[ ] direct mail solicitation for pecuniary gain of any particular group. The State has instead established an indirect barrier to commercial speech by not making certain records available for that purpose." *Id.*, at 1515. The

Tenth Circuit also expressly rejected the contention, central to the Sixth Circuit's ruling in this case, that exceptions allowing the use of allegedly private and personal information undermine the State's reasons for enacting the statute. *Id.* at 1514.

Siding with the Tenth Circuit is the South Carolina Supreme Court which, in *DeSalvo v. Louisiana*, 624 So.2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), held that a similar statute was not unconstitutional.

Many of the courts which have addressed this issue have recognized the division between their decisions and those of other courts. Indeed, the district court in this case explicitly cited the conflict in its decision:

> A close question is presented to the Court as to the constitutionality of the statutes challenged by the plaintiffs. There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) and *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508 (10th Cir. 1994). In addition, the decisions in *Moore v. Morales*, 843 F.Supp. 1124 (S.D. Texas), and *Innovative Data Base Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), hold that Texas may not prohibit chiropractors or attorneys from receiving access to motor vehicle accident reports on the grounds that they will use the information for financial gain.

Amelkin v. Commissioner, 936 F.Supp. at 429.

Certiorari is also warranted because the decision below directly implicates another important conflict in

the lower courts which have divided over the constitutionality of a closely related commercial-use prohibition involving campaign records. The federal government and many states permit the release of campaign contribution records, but only so long as the recipient agrees not to use the information for commercial or solicitation purposes. The en banc D.C. Circuit upheld the federal statute in *FEC v. International Funding Institute*, 969 F.2d 1110, *cert. denied*, 506 U.S. 10001 (1992), despite the fact that "[t]he information in the report submitted by a political committee may freely be copied, published, and with one exception, used in any way." *Id.* at 1117. The Supreme Court of Missouri, however, invalidated that state's parallel statute in *Ryan v. Kirkpatrick*, 669 S.W.2d 215 (Mo. 1984) (en banc), and the Second Circuit has narrowly construed the federal provision in light of serious concerns about its constitutionality. *FEC v. Political Contributions Data*, 943 F.2d 190 (2d Cir. 1991).

Certiorari also is warranted because the decision below is directly implicated by this Court's decision in *New Orleans Broadcasting v. United States*, 527 U.S. ___, 119 S.Ct. ___, 144 L.Ed.2d 161 (1999), that invalidated a federal ban on gambling advertising as a First Amendment violation because the rationale for the ban is undermined by "its attendant regulatory regime [that] is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.*, 527 U.S. at ___, 144 L.Ed.2d at 178. As this is the same rationale employed by the Sixth Circuit to invalidate the Kentucky statute in issue, the Court should grant the Petition to clarify that exceptions undermining a stated purpose also doom laws such as this that prevent commercial speech.

The states' encroachment upon the commercial speech rights of its citizens is pervasive and continuing. So long as the unresolved division between the circuits and the states continues over whether this encroachment is constitutional, state legislatures will continue to pass and enforce statutes allowing unrestricted non-commercial communications and publication of information contained in traffic reports while at the same time foreclosing similar communications and publications solely on the basis that the latter have a commercial purpose.

This Court has already determined, by its aborted grant of the petition for writ of certiorari in *United Reporting Publishing*, that the conflict needs to be resolved. As will be shown below, the procedural bar divesting this Court of its authority to address the conflict in *United Reporting Publishing* does not exist in this case which is ripe for review by this Court. There is no reason the Court should not press forward with its intent to address the issue and many reasons why it should, the most pressing of which is the unnecessary and harmful delay that would result from denial of this Petition. Petitioners have been through the district court and the Sixth Court twice in their six-year journey to protect these important rights. In the last leg, it took nearly four years for the case to wend its way from the Sixth Circuit's remand through the hearing in the district court, the appeal in the Sixth Circuit and this Court's grant of Respondent's petition in December, 1999.

Given the Respondents' filing of a petition for a writ after the Sixth Circuit's last decision in Petitioners' favor, there is little doubt they will petition again from the foreordained identical decision that will, at some future

point, be issued again by that Court. This process should be short-circuited now and the decision of the Sixth Circuit on the merits of this case be reviewed in order to resolve this divisive and important conflict.

II. Petitioners' challenge to the Kentucky statute was not a facial attack made on overbreadth grounds but as it applied to them and, therefore, there is no procedural bar to this Court's review of the Sixth Circuit's decision that the statute is unconstitutional.

The procedural infirmity that doomed appellate review of the Ninth Circuit's *United Reporting* decision does not infect the district court's decision in this case since the Petitioners launched an "as applied" challenge, not a "facial challenge," to KRS 189.635. The allowance of a facial challenge to restrictions on speech, also known as the "overbreadth doctrine," is an exception to the "general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). The exception to that "general rule" is "for laws that are written so broadly that they may inhibit the constitutionally protected speech **of third parties**." *Id.* (emphasis added). Its genesis was this Court's decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940), where "the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected."

Taxpayers for Vincent, 486 U.S. at 798, *citing Thornhill, supra.*

To merit a facial challenge, the overbreadth of the challenged law must be substantial, a requirement stemming from "the interest in preventing an invalid statute from inhibiting the speech of **third parties who are not before the Court.**" *Taxpayers for Vincent*, 486 U.S. at 800 (emphasis added). A conclusion that a law is vulnerable to an overbreadth challenge "rest[s] on an evaluation of the assumed effect of the ordinance on **third parties**, rather than on any specific consideration of the impact of the ordinance on the parties before the court." *Id.* at 801 (emphasis added).

There is no question but that "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982), *citing Central Hudson*, 447 U.S. at 565, n. 8.

This Court reversed the Ninth Circuit's decision in *United Reporting* because the plaintiff had not challenged the statute's regulation of its own speech. The *United Reporting* plaintiff was a "publishing service that provides the names and addresses of recently arrested individuals to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools." *United Reporting*, 120 S.Ct. at 486. This Court found that the plaintiff's failure to assert a restriction of *its own speech* deprived it of standing to challenge the statute regulating its access to the addresses.

First, the plaintiff had not attempted and been refused access to the addresses by signing the declarations required by the statute, that is, by " 'declar[ing]

under penalty of perjury' that it was requesting information for one of the prescribed purposes and that it would not use the address information to 'directly or indirectly . . . sell a product or service,' as would have been required by the statute." *United Reporting*, 120 S.Ct. at 487. Since the plaintiff "did not attempt to qualify and was therefore denied access to the addresses," "[f]or purposes of assessing the propriety of a facial invalidation," the Court had before it "nothing more than a governmental denial of access to information in its possession." *Id.* at 489.

Second, since the state did not refuse the plaintiff access to the addresses because of the content of **the plaintiff's** speech, the plaintiff did not present an "as applied" challenge to the statute. Because the overbreadth doctrine does not apply to commercial speech cases, the plaintiff could not obtain standing to challenge the statute by relying on the statute's restrictions on its **customers'** speech. "To the extent that respondent's 'facial challenge' seeks to rely on the effect of the statute on **parties not before the Court – its potential customers**, for example – its claim does not fit within the case law allowing courts to entertain facial challenges." *Id.* (emphasis added).

This Court distinguished the position of those potential customers of the plaintiff and their capacity to challenge the impact of the statute on themselves. "They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied." *Id.*

The position of the Petitioners in this case is materially different from the plaintiff in *United Reporting* and identical to that of plaintiff's **customers**, who would have standing to bring an "as applied" challenge to the statute. They are, in fact, the "potential customers" whose speech would have been effected by the statute in *United Reporting*. The Petitioners here **are** the lawyers and chiropractors who would use the information in their communications, their speech, with prospective clients and patients. It is the speech of these parties – the parties who are before the Court – that is effected by the challenged statute.

The procedural context of this case establishes beyond question that the challenge brought against KRS 189.635 was an "as applied" challenge. The case is a consolidation of several cases brought in several venues under several sets of facts. The set of facts that most clearly establishes the "as applied" as opposed to "facial" challenge is the Open Records appeal filed by the Commonwealth of Kentucky in state court, removed to the federal district court by defendant attorney Kaplan and defendant newspaper publisher Bogard, and transferred to the Western District of Kentucky where it was consolidated with the original action. In that case, Kaplan's and Bogard's requests for copies of accident reports from the City of Louisville was granted conditioned on their agreement to pay an enhanced fee for documents requested for a commercial purpose. The City had reserved the right to refuse access to the reports if Kaplan and Bogard appealed that decision Kentucky Attorney General Opinion 94-ORD-145; App. at 72a.

Kaplan and Bogard prevailed on their open records appeal to the Attorney General of the conditional grant of their request for access to accident reports. The state then appealed the Attorney General's opinion. Kaplan's and Bogard's case, which was consolidated with the three other cases making up this action, presents a fact pattern that did not exist in *United Reporting*: the state's denial of a request for access to accident reports sought by persons intending to use them to communicate with potential clients. In addition, the claims asserted in the other complaints making up this case present the fact pattern that this Court in *United Reporting* implicitly found would have constituted a proper "as applied" challenge to the statute, that is, the claim of the "potential customers" of the plaintiff publishing service. Since the complaint was brought by the "potential customers" who intended to use the accident reports in their own speech, it was not brought on behalf of third parties not before the court and was not, therefore, a facial challenge.

This fact did not escape either the district court or the Sixth Circuit. In its decision in *Amelkin II* the Sixth Circuit recognized that the evidence presented to the trial court addressed the effect of KRS 189.635 on these particular parties. There, the plaintiffs were described as "attorneys and chiropractors [who] would use the information contained [in the reports] to contact victims and offer their services, . . . " *Amelkin II*, 168 F.3d at 895; App. at 11a.

The district court also analyzed the constitutionality of the statute in light of the Petitioners' claims that it unlawfully restricted their speech as attorneys and chiropractors. The district court's decision reflects its understanding that the challenge brought by Petitioners was to

the statute as it applied to them. It analyzed their claims explicitly in light of the existing law on the constitutionality of restrictions on lawyers' solicitation of clients.

Petitioners' claims are clearly those of individuals complaining of the restrictive impact of a statute on their own speech. This was not a facial challenge but a challenge to the law as it applies to these Petitioners. The ground for this Court's refusal in *United Reporting* to review the facial challenge brought by the plaintiff in that case does not exist here. The district court and the Sixth Circuit had the authority to determine, as they did, that KRS 189.635 is unconstitutional as it applies to the speech of the Petitioners.

CONCLUSION

This case has already been through the district court and the Court of Appeals twice. To send it back to the district court a third time because of a non-existent procedural bar would unnecessarily prevent this Court from addressing an issue it has already decided is significant enough to grant a petition for a writ of certiorari. In the meantime, the conflict and the resulting confusion among the courts and the states continue. Accordingly, this Court should grant the Petition for a Writ of Certiorari and reinstate the decision of the United States Court of

Appeals for the Sixth Circuit finding unconstitutional KRS 189.635.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Sixth Circuit Decision 2/24/00 ..... 1a

Supreme Court Decision 12/13/99 ..... 8a

Sixth Circuit Opinion 02/17/99 ..... 9a

Sixth Circuit Opinion 01/09/96 ..... 33a

District Court Memorandum Opinion 06/3/96..... 47a

District Court Memorandum Opinion 08/2/94..... 56a

Sixth Circuit Order denying Petition for Rehearing dated 03/30/00..... 66a

Amendment to the U.S. Constitution..... 68a

Senate Bill No. 351 dated 03/30/94..... 69a

Kentucky Attorney General Opinion 12/9/94..... 72a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED.
App. 0066P (6th Cir.)
File Name: 00a0066p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEPHEN AMELKIN, Broadway Chiropractic; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD, doing business as Bogard & Associates,	)	No. 96-5942
Plaintiffs-Appellees,	)	
CITY OF LOUISVILLE, Division of Police,	)	
Plaintiff,	)	
v.	)	
ANN MCCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; BEN CHANDLER, Attorney General,	)	
Defendants-Appellants,	)	
JUSTICE CABINET, Department of State Police,	)	
Plaintiff/Counter Defendant-Appellant,	)	
JEFFERSON COUNTY, KENTUCKY,	)	
Defendant.	)	

On Remand from the United States Supreme Cou
Nos. 94-00360, 95-00022, 95-00352 – Charles M. Allen, District Judge.

Argued: April 24, 1998

Decided and Filed: February 24, 2000

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: William B. Pettus, OFFICE OF THE ATTORNEY GENERAL, CIVIL & ENVIRONMENTAL LAW DIVISION, Frankfort, Kentucky, Lucy B. Richardson, COMMONWEALTH OF KENTUCKY JUSTICE CABINET, GENERAL COUNSEL, Frankfort, Kentucky, for Appellants. Donald L. Cox, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, for Appellees. **ON BRIEF:** William B. Pettus, OFFICE OF THE ATTORNEY GENERAL, CIVIL & ENVIRONMENTAL LAW DIVISION, Frankfort, Kentucky, Lucy B. Richardson, COMMONWEALTH OF KENTUCKY JUSTICE CABINET, GENERAL COUNSEL, Frankfort, Kentucky, for Appellants. Mary J. Lintner, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, for Appellees. Laurence J. Zielke, PEDLEY, ZIELKE, GORDINIER, OLT & PENCE, Louisville, Kentucky, for Amicus Curiae.

OPINION

RONALD LEE GILMAN, Circuit Judge. On December 13, 1999, the Supreme Court vacated our February 17,

1999 decision in the above-styled matter, *see Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999), and remanded the case for further consideration in light of *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. ___, 120 S.Ct. 483 (1999). After taking into account the majority's holding in *United Reporting*, we **REVERSE** the district court's decision to enjoin the enforcement of Kentucky Revised Statute § 189.635(5)-(6), which was based upon the plaintiffs' "facial challenge" to the statute restricting access to police accident reports. We further **REMAND** the case for consideration of the plaintiffs' "as-applied" challenge to the statute. The remainder of our prior decision was not affected by the Supreme Court's action and continues to be the ruling of this court.

I. FACTUAL SUMMARY

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, one restricting access to police accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. On appeal, we affirmed the district court's injunction regarding KRS § 189.635 (restricting access to police accident reports), but vacated and remanded its decision regarding KRS § 61.874 (allowing fees to be charged to commercial users for copies of the reports). *See Amelkin*, 168 F.3d at 901-02.

II. ANALYSIS

A. The Facial Challenge to KRS § 189.635

The first issue that must be addressed is whether the plaintiffs can bring a facial challenge to KRS § 189.635, the statute that regulates access to police accident reports in Kentucky, in light of the Supreme Court's recent decision in *United Reporting*. In *United Reporting*, a private publishing company in California had been providing the names and addresses of recently arrested individuals to its customers, who included attorneys, insurance companies, drug and alcohol counselors, and driving schools. It received the names and addresses from local law enforcement agencies until the state of California amended Cal. Gov't Code § 6254(f)(3) to require that a person requesting an arrestee's name and address declare that the request is being made for one of five prescribed purposes, and that the name and address will not be used directly or indirectly to sell a product or service. United Reporting sought declaratory and injunctive relief, and requested that the amended section be declared unconstitutional under the First and Fourteenth Amendments.

The district court construed United Reporting's claim as a facial challenge to § 6254(f)(3), granted United Reporting's motion for summary judgment, and enjoined the enforcement of the statute. Upon appeal, the Ninth Circuit affirmed the district court's judgment, concluding that the statute was facially invalid. The Supreme Court, however, reversed the Ninth Circuit, and held that § 6254(f)(3) did not warrant the drastic measure of declaring facial invalidity. *See United Reporting*, 120 S.Ct. at 489.

An overbreadth facial attack is made when a challenger argues that an otherwise valid law might be applied unconstitutionally in a specific context. *See generally United Reporting*, 120 S.Ct. at 488-89. If a facial challenge is upheld, then the state cannot enforce the statute against anyone. *See Board of Trustees v. Fox*, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all of its applications, since every person to whom it is applied can defend on the basis of the same overbreadth."). On the other hand, an "as-applied" challenge consists of a challenge to the statute's application only to the party before the court. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758-59 (1988) (noting that as-applied challenges are reviewed on a case-by-case basis). If it is successful, the statute may not be applied to the challenger, but is otherwise enforceable. *Id.*

Overbreadth facial challenges are normally rejected because "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). As explained by the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

One of the few exceptions to the presumption against facial challenges is if a statute proscribes speech and threatens violators with prosecution. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972). In *United Reporting*,

the Supreme Court held that a facial challenge was not warranted because § 6254(f)(3) neither imposed a threat of criminal prosecution nor "chilled" expressive speech – it simply restricted access to government information. *Id.* at 489-90.

Based on the reasoning set out in *United Reporting*, KRS § 189.635 is similarly not subject to a facial challenge because it does not carry the threat of prosecution for violating the statute and it does not restrict expressive speech, but simply regulates access to the state's accident reports. In this regard we find no material differences between KRS § 189.635 and the California statute that the Supreme Court considered in *United Reporting*. Because the district court only addressed the plaintiffs' facial challenge, as indicated by the fact that it permanently enjoined the state of Kentucky from enforcing KRS § 189.635, *see Amelkin v. McClure*, 936 F.Supp. 428 (W.D. Ky. 1996), we must reverse and remand the case for the district court to consider the plaintiffs' as-applied challenge.

B. The Challenge to KRS § 61.874

The district court also enjoined the enforcement of KRS § 61.874, the statute that allows the state custodian of nonexempt public documents to charge commercial users for producing copies of police accident reports. It did so without making specific findings regarding the four factors that are used in determining whether a preliminary injunction should be granted. *See Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994). Without the benefit of such

factual findings, it is impossible for us to judge the validity of the plaintiffs' arguments. Accordingly, our prior opinion vacated and remanded the case back to the district court to make findings of fact and conclusions of law as to how KRS § 61.874 has been applied by the state agency. *See Amelkin*, 168 F.3d at 901-02. This portion of our prior opinion was not modified by *United Reporting*, and continues to be the ruling of this court.

III. CONCLUSION

For the reasons set forth above, the district court's decision regarding KRS § 189.635 is **REVERSED** and **REMANDED** for consideration of the plaintiffs' as-applied challenge, and its decision regarding KRS § 61.874 is **VACATED** and **REMANDED**, all for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 13, 1999

Mr. Donald L. Cox
500 Meidinger Tower
462 South Fourth Street
Louisville, KY 40202

Re: Ann McClure, Document Custodian, et al.
v. Stephen Amelkin, Broadway Chiropractic, et al.
No. 99-200

Dear Mr. Cox:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. ___ (1999).

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Stephen AMELKIN, Broadway Chiropractic; Dr. Brian Christopher Fee; Stuart Lyon; Nicolas Baker; David Kaplan; James W. Chambers; Sidney Hanish; Rhoda Daniels; Thomas H. Watson; Kenneth W. Wall; James Bogard, doing business as Bogard & Associates, Plaintiffs-Appellees,
City of Louisville, Division of Police, Plaintiff,

v.

Ann McCLURE, Document Custodian; Gary Rose, Commissioner of Department of State Police; Ben Chandler, Attorney General, Defendants-Appellants, Justice Cabinet, Department of State Police, Plaintiff/ Counter Defendant-Appellant,
Jefferson County, Kentucky, Defendant.

No. 96-5942.

United States Court of Appeals,
Sixth Circuit.

Argued April 24, 1998.

Decided Feb. 17, 1999.
Rehearing and Suggestion for Rehearing En Banc Denied April 30, 1999.

Mary J. Lintner (briefed), Donald L. Cox (argued), Lynch, Cox, Gilman & Mahan, Louisville, KY, for Plaintiffs-Appellees.

Denise M. Smith (briefed), Benesch, Friedlander, Coplan & Aronoff, Cincinnati, OH, Laurence J. Zielke (briefed), Pedley, Zielke, Gordinier, Olt & Pence, Louisville, KY, for Plaintiff-Appellant Justice Cabinet.

Steve Durham, Office of the General Counsel, Corrections Cabinet, William B. Pettus, Asst. Atty. Gen. (argued and briefed), Office of the Attorney General, Civil &

Environmental Law Division, Frankfort, KY, for Defendant-Appellant Ann McClure and Ben Chandler.

Steve Durham, Office of the General Counsel, Corrections Cabinet, Lucy B. Richardson (argued and briefed), Commonwealth of Kentucky, Justice Cabinet, General Counsel, William B. Pettus, Asst. Atty. Gen., Office of the Attorney General, Civil & Environmental Law Division, Frankfort, KY, for Defendant-Appellant Gary Rose and Justice Cabinet.

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. SILER, J. (pp. 902-03), delivered a separate opinion concurring in part and dissenting in part.

OPINION

GILMAN, Circuit Judge.

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, one restricting the disbursement of accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. For the reasons set forth below, we AFFIRM the portion of the district court's injunction relating to the

amendments restricting the disbursement of accident reports, but VACATE AND REMAND for further proceedings the portion of the district court's order enjoining the amendments that allow the charging of reasonable fees for copying nonexempt public documents.

I. BACKGROUND

Until 1994, Kentucky Revised Statutes § 189.635(5) provided that "all accident reports filed with the Department of State Police . . . shall remain confidential." Despite the all-encompassing nature of the statutory language, a Kentucky Attorney General's Opinion issued in 1989 determined that the privacy exemption under Kentucky's Open Records Law was "discretionary." This had the effect of making all accident reports accessible to the public. Accident reports soon became a prime source for attorneys and chiropractors in Kentucky to identify prospective clients. As one chiropractor noted: "In order to determine what potential patients would be in need of chiropractic services, I have routinely submitted open records requests to various law enforcement agencies in order to obtain copies of accident reports."

Such accident reports contain the name, address, and driver's license number of those involved in the accident, and a diagram and brief description of the accident itself. After procuring these reports, certain attorneys and chiropractors would use the information contained therein to contact victims and offer their services, often attaching the accompanying accident report to the solicitation letter. Plaintiff James Bogard has in the past made a business out of assisting these attorneys and chiropractors by

supplying them with the accident reports that he has obtained from law enforcement agencies. Bogard also intends to publish a newspaper, The Accidental Journal, that will contain copies of accident reports and that will be marketed primarily to attorneys and chiropractors.

The efforts to solicit potential clients through the procurement and use of accident reports became so incessant that those involved in traffic accidents immediately began receiving large stacks of direct mail solicitations from various attorneys and chiropractors. A typical example of such a mailing is reproduced below:

> Public records indicate you were involved in an automobile accident recently. You may have been injured at the time of the accident. Often times a person finds there was an injury a day or so after the accident. Sometimes a person is stunned or has a surge of adrenaline that masks the symptoms of injury at the time the accident report is made. If you find that you did suffer personal injury due to the automobile accident, I can help you.
>
> For over thirty years I have been representing people like you against insurance companies. I have the knowledge, the expertise, and most of all, the practical wisdom to guide you.
>
> You are not expected to know the usual or unusual methods that insurance representatives use on injured persons. Do not be misled, misinformed or fall prey to an easy settlement from the insurance company. KNOW YOUR LEGAL RIGHTS.
>
> Protect yourself. Get information from a lawyer. You have one body and it has to serve you your

whole life. Make sure you receive the right medical treatment you need.

Just as you expect your doctor to give the proper medical treatment, so should you have an attorney to see that your legal rights are protected. By going to an experienced lawyer you can have the peace of mind that you will be protected and your claim will be well represented.

Not long after the Attorney General's Opinion was issued in 1989, a public groundswell developed against the release of accident reports to attorneys and chiropractors. One editorial described the attorneys who used such accident reports as "greedy, money grubbing lawyers" who seemed "to prey on the misfortunes of others." Ky. Bench & Bar, Summer 1993, at 7. In addition to the solicitations tarnishing the image of the legal community in the eyes of the public, some who received a mailbox full of such letters grew concerned over their personal privacy and safety. One recipient of such direct mail solicitation related his experience as follows:

On April 1, 1993 I was involved in an automobile collision wherein my vehicle was struck in the rear. I was transported to the hospital and was treated for injuries for which I have now recovered.

Shortly after the collision I received via U.S. Mail the following:

1. Solicitation letter from Attorney [A] and a complimentary copy of the police report with his advertisement on the reverse side.

2. Solicitation letter from Attorney [B] and a complimentary copy of the police report.

3. Solicitation letter from Attorney [C].

4. Solicitation letter from Attorney [D].

I additionally received solicitations from various chiropractors but failed to retain that information since it was so voluminous.

Ms. Richardson, if it was my desire to engage the services of an attorney I would do so using my own resources to make such a selection. In addition, I feel that this is a direct infringement upon my right of privacy. It is my desire and constitutional right to maintain privacy. Publicly revealing my home address is unconscionable and unacceptable and a personal affront to my rights.

My occupation is such that it is mandatory that my home address remain confidential. The promulgation of same may place myself as well as my family in danger of physical harm.

(Emphasis in original).

In an attempt to protect accident victims from being hounded by unwanted solicitations from attorneys and chiropractors, the Kentucky general assembly amended § 189.635 and § 61.874 of the Kentucky Revised Statutes in 1994. The relevant text of the amended statutes is reproduced below:

189.635 VEHICLE ACCIDENT REPORTS BY OPERATORS LAW ENFORCEMENT OFFICERS AND AGENCIES – AVAILABILITY TO PARTIES TO ACCIDENT AND NEWS-GATHERING ORGANIZATIONS.

. . . .

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

(6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Ky.Rev.Stat. Ann, § 189.635 (Banks-Baldwin 1995).

61.874. ABSTRACTS, MEMORANDA, COPIES – AGENCY MAY PROSCRIBE FEE

. . . .

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. . . .

(4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following: 1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records; 2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

Ky.Rev.Stat. Ann, § 61.874 (Banks-Baldwin 1997).

Governor Brereton Jones later stated that he signed the amendments to Kentucky's Open Records Law to "provide [ ] a measure of protection to accident victims" by "prohibit[ing] distribution [of accident reports] for commercial purposes."

Almost immediately after passage, the plaintiffs filed suit against Ann McClure (a custodian of accident reports at a local state police post) and an assortment of other government officials, all in an effort to enjoin enforcement of the statutes. They claimed that the statutes infringe on their First Amendment right to freedom of expression. Following a lengthy hearing, the district court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment. This timely appeal followed.

II. ANALYSIS

A. The Challenge to § 189.635

The defendants contend that all § 189.635 does is limit the category of people who have access to accident reports. In the defendants' brief, they assert that the statute does not "even hint at . . . or place unconstitutional conditions on the use of this accessed material by restricting speech related purposes." Because § 189.635 is purportedly a "pure denial of access statute," they claim that it is constitutional under the Supreme Court's decision in *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), where the Court noted that the First Amendment does not "guarantee . . . a right of access to all sources of information within government

control." *Id.* at 9, 98 S.Ct. 2588. Section 189.635, however, is not as benign as the defendants would have us believe.

Subsection 6 of § 189.635 clearly restricts a "news-gathering organization" from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with respect to news organizations which makes § 189.635 fatally flawed.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court articulated a four-part test to analyze the constitutionality of government regulations limiting commercial speech:

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343 (Enumeration added).

1. Protected Expression

The parties agree that the speech at issue is neither illegal nor misleading under the first prong of the *Central*

Hudson test. Rather, their dispute centers around the remaining three prongs.

2. Governmental Interest

The defendants argue that the governmental interest behind § 189.635 is to protect accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public. We are persuaded that such an interest is substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.1994); *Speer v. Miller*, 864 F.Supp. 1294 (N.D.Ga.1994); *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998) (holding that disclosure of information contained in undercover officers' personnel files violated the officers' privacy interest in preserving their lives and personal security); *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998) (holding that government's asserted interest in protecting the privacy of arrestees is substantial under *Central Hudson*).

As the Supreme Court has noted: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Indeed, "[the Supreme Court's] precedents . . . leave no room for doubt that the protection of potential clients' privacy is a substantial state interest." *Went For It*, 515 U.S. at 625, 115 S.Ct. 2371

(internal quotation marks omitted). The Court has also "noted that 'a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.' " *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). From this abundance of legal authority, we hold that the government's asserted interest in protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the *Central Hudson* test.

3. Advancement of Governmental Interest

Concluding that the government's asserted interest is substantial, however, does not end our inquiry, but requires that we examine the next prong of the *Central Hudson* test – whether the challenged governmental regulation "advances the Government's interest 'in a direct and material way.' " *Rubin v. Coors Brewing*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). The defendants, as the "party seeking to uphold [the] restriction on commercial speech," have the burden of justifying the restriction. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). This burden may not be satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792. Instead, " 'a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585

(quoting *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792). When the regulation only provides ineffective or remote support for the government's purpose, it does not withstand constitutional scrutiny. *See Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792.

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and safety of accident victims. Specifically, the district court noted that "the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the State asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers." *Amelkin v. Commissioner*, 936 F.Supp. 428, 431 (W.D.Ky.1996). The defendants claim that the district court erred in so finding, arguing that a prohibition against the release of accident victims information (1) reduces the opportunity for criminals to misuse such information, either by stalking accident victims or by using the information contained therein to defraud such victims, and (2) serves to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims and their families.

As to the first argument, the defendants have provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences.

For example, the same type of personal information found in accident reports could also be gathered by requesting from the department of motor vehicles information contained on a driver's license. This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech. *See Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585. Because the defendants have failed to sustain their burden of proving that this harm is real, we need not consider whether the restriction will alleviate the asserted harm to a material degree. *See id.*

Unlike the defendants' first argument, their second argument in support of the statute – to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims – is at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. The district court in fact rejected the contention that § 189.635 materially advances the governmental interest in protecting the privacy of accident victims on the very grounds that such an interest is undermined by the exceptions provided for in the statute, particularly the provision allowing accident reports to be obtained and published by news-gathering organizations. *See Amelkin*, 936 F.Supp. at 431. In this respect, § 189.635 "does not restrict all (or probably even most) possible invasions of a person's privacy." *United Reporting*, 146 F.3d at 1139. The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim

that the statute is actually intended to protect the privacy interests of accident victims. *See Amelkin*, 936 F.Supp. at 431.

The exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir.1997). Our conclusion is reinforced by the holding in *Coors Brewing*, 514 U.S. at 476, 115 S.Ct. 1585, where the Supreme Court determined that 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing the alcohol content of beer on their labels, violated the First Amendment. The Court held that the government's asserted interest in avoiding alcohol "strength wars" was substantial, but that § 205(e)(2) did not directly advance that interest "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488, 115 S.Ct. 1585. The regulatory scheme was irrational because of the numerous exceptions Congress appended to § 205(e)(2), including an exception for wines and distilled spirits, which were allowed to list alcohol content on their labels, and the failure to extend the ban on disclosing alcohol content to advertisements. *See id.* As the Court observed, "[t]here is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.* at 489, 115 S.Ct. 1585.

For the same reasons, the exception to § 189.635(5) for news-gathering organizations renders the statute unconstitutional under the First Amendment. There is no rational basis for a statute which purports to advance the

governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. "Having one's name . . . and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney . . . eager to help one overcome his present difficulties (for a fee, naturally)." *United Reporting*, 146 F.3d at 1140. The exceptions to § 189.635 "undermine and counteract" the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*.

The defendants, however, seek to re-characterize the nature of the affront to accident victims' privacy as being the receipt, often voluminous, of direct mail solicitations from lawyers and chiropractors. But the invasion of an accident victim's privacy does not stem from the victim's mailbox being stuffed by direct mail solicitations from attorneys and chiropractors. If such were the case, then most of us would feel no sense of privacy because of the seemingly unstoppable torrent of junk mail which flows into most citizens' mailboxes. Instead, the true affront to a person's privacy comes from the "solicitor's discovery of the information [contained in the accident report] that led to the solicitation." *United Reporting*, 146 F.3d at 1139; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].").

As one district court has noted: "It is hard to see how direct mail solicitations invade the privacy of [individuals]. If they don't like the solicitation, they can simply throw it away." *United Reporting Publishing Corp. v. Lungren*, 946 F.Supp. 822, 828 (S.D.Cal.1996); *see also Bolger*, 463 U.S. at 72, 103 S.Ct. 2875 ("Consequently, the short, though regular journey from the mail box to the trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."(internal quotation marks omitted)). Instead, the true motivation behind § 189.635 appears to be directed at preventing attorneys and chiropractors from looking at accident reports, with the secondary consequence that direct mail solicitation practices would be curtailed.

The defendants also claim that the district court erred in not following the Tenth Circuit's decision in *Lanphere & Urbaniak*, 21 F.3d at 1508, which reviewed a similar statute. In that case, the Tenth Circuit held that it had "no trouble" finding that the state's interest in protecting privacy was directly advanced by the statute in question. *Id.* at 1515. The Tenth Circuit failed, however, to provide any reasoning for why it had "no trouble" reaching this conclusion. Instead, the court simply asserted:

> The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and [Driving Under the Influence]. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by

> solicitors where potential solicitation recipients may be particularly vulnerable.

Id.

We agree with the district court's decision not to follow *Lanphere*. As the Ninth Circuit recently observed: "*Lanphere* fails to take into account the Supreme Court's decision in *Edenfield*, 507 U.S. at 767, 113 S.Ct. 1792 (holding that the third prong of *Central Hudson* requires the challenged regulation to advance the state interests 'in a direct and material way,' not merely a direct or 'reasonably' direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476, 115 S.Ct. 1585." *United Reporting*, 146 F.3d at 1139 n. 4.

Finally, the defendants claim that the statute still advances the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided. The defendants rely on Kentucky Revised Statutes § 61.878(1)(a), which is part of Kentucky's Open Records Law. Nothing in this statute, however, requires that state agencies redact such information from accident reports. Section 61.878(1)(a) only provides that "public records" are excluded from the provisions of Kentucky's Open Records Law if they contain "information of a personal nature" and its release would cause "a clearly unwarranted invasion of personal privacy." There is nothing in the statutory language compelling the custodian of accident records to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity.

4. Restriction on Commercial Speech More Extensive Than Necessary

Because we conclude that § 189.635(6) does not directly advance the asserted governmental interest, there is no need for us to consider the final prong of *Central Hudson* (whether the restriction on commercial speech is more extensive than necessary to advance such interest).

B. Severability

Having concluded that § 189.635(6) violates the First Amendment, we must next determine whether that portion of the statute may be severed without requiring that § 189.635(5) be similarly struck down.

Kentucky's general severability statute, § 446.090, provides as follows:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, . . . unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

Ky.Rev.Stat. Ann, § 446.090 (Banks-Baldwin 1993).

As noted earlier, the motivating purpose behind the passage of § 189.635(5)-(6) was apparently to protect the

privacy of accident victims from having their accident reports inspected by attorneys and chiropractors who desire to solicit their business. Without § 189.635(6), news-gathering organizations would have no access at all to accident reports. Given the clear public interest in having a general awareness of accidents taking place within the community, we believe "it is apparent that the general assembly would not have enacted the remaining parts without the unconstitutional part." Ky.Rev.Stat. § 446.090. Because retaining § 189.635(5) alone would be contrary to the legislature's intent in passing the amendments to § 189.635(5)-(6), we find that the one cannot be severed from the other. Accordingly, § 189.635(5), given its inextricable links to § 189.635(6), must also fall.

C. The Challenge to § 61.874

This particular case has made a number of trips to our court, each time resulting in it being remanded to the district court because of a procedural irregularity or other infirmity. Unfortunately, a portion of the district court's opinion in this appeal has a similar flaw – it fails to provide any findings of fact or conclusions of law with respect to the "as applied" challenge to § 61.874. The plaintiffs contend that the agency responsible for implementing § 61.874 has applied the "reasonable fee" provision in an arbitrary and discriminatory manner insofar as commercial users are concerned. Their brief alleges that "the Commonwealth increased the cost of the reports from 10 cents per page to $40 per report for non-injury accidents; $90 per report for injury accidents; and $230 per report for fatal accident reports. The Commonwealth proposed to charge Appellee Lyon $17,650 for two weeks

of reports, which previously would have cost him about $68."

While the district court enjoined the enforcement of § 61.874, it did so without making specific findings regarding the following four factors as set forth in *Washington v. Reno*, 35 F.3d 1093 (6th Cir.1994):

> The factors to be considered by a district court in deciding whether to grant a preliminary injunction are well established in this circuit. In making that determination a court must consider: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Id. at 1099.

Without the benefit of such factual findings, it is impossible for us to judge the validity of the plaintiffs' arguments. As this court stated in *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*: "A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." 119 F.3d 393, 399 (6th Cir.1997). In this case, the district court did not make a specific finding with respect to any of the factors enumerated above. Although the plaintiffs cite examples of the allegedly arbitrary and capricious manner in which the agency has charged fees

since the enactment of the statute, no such findings are in the record before us.

Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency. In so doing, we suggest that the court particularly focus on the "creation" language in § 61.874(4)(c)(2). The agency could potentially be using this language to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into "creating" the record. In other words, the agency might be utilizing the "creation" language as a basis to charge more than the agency's marginal or even average cost in producing the records. Instead, the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the creation of accident reports. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied.

III. CONCLUSION

Having concluded that Kentucky Revised Statute § 189.635(6) violates part three of the *Central Hudson* test, we AFFIRM the district court's decision to enjoin the enforcement of § 189.635(5)-(6) as an unconstitutional infringement on the First Amendment right to freedom of expression. With respect to Kentucky Revised Statute § 61.874, however, the district court's failure to provide any findings of fact or conclusions of law requires that its

decision to enjoin § 61.874 be VACATED and REMANDED for further proceedings consistent with this opinion.

SILER, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent, for I believe that the decision of the district court should be reversed entirely. Therefore, I concur in Part II.C. of the majority opinion where it vacates and remands the district court's decision concerning the challenge to Ky.Rev.Stat. § 61.874. I also concur in Part II.B. (severability), finding that if Ky.Rev.Stat. § 189.635(6) is unconstitutional, then the whole statute is unconstitutional. Nevertheless, because I would find that Ky.Rev.Stat. § 189.635(6) is not unconstitutional, the severability portion is not applicable to my opinion.

Initially, there is no general First Amendment right for the public to access criminal justice records. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir.1994). The majority is correct in analyzing the statute under the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The majority, however, has stopped at the third prong from *Central Hudson*, finding that the regulation does not directly advance the governmental interest asserted.

Agreeing with the majority, I question whether the Commonwealth of Kentucky has shown that the prohibition against the release of the accident victims information reduces the opportunity for criminals to misuse such information, for there seems to be little evidence about that. However, the prohibition certainly serves to prevent

the direct and unnecessary intrusion into the private lives and homes of accident victims and their families. Obviously, the attorneys and insurance carriers for the persons involved in the accident should have access to this information, for they are all representatives of the persons involved. In addition, the Commonwealth has allowed the news media to obtain this information for noncommercial use, that is, for news reports. Although this, to some degree, intrudes into the private lives and homes of the victims, it intrudes much less than publication in a commercial pamphlet intended to aid attorneys and chiropractors in soliciting the victims.

Although the majority finds *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998), more persuasive than the decision in *Lanphere*, I believe *Lanphere* is more persuasive. Therefore, I would follow *Lanphere* and find that the Commonwealth has a substantial interest in the case and that the statute advances those interests in a reasonably direct way. Finally, I would find that the statute effects a reasonable fit under the framework of *Central Hudson*.

Stephen AMELKIN, Broadway Chiropractic; Brian Christopher Fee, Dr., Chiropractor; Stuart Lyon; Nicolas Baker; David Kaplan; James W. Chambers; Sidney Hanish; Rhoda Daniels; Thomas H. Watson; Kenneth W. Wall; James Bogard, doing business as Bogard & Associates, Plaintiffs-Appellees,

v.

Ann McCLURE, Document Custodian Kentucky State Police Post # 4; Jerry Lovitt, Commissioner of Department of State Police, Commonwealth of Kentucky; Chris Gorman, Attorney General of the Commonwealth of Kentucky, Defendants-Appellants.

No. 94-6161.

United States Court of Appeals, Sixth Circuit.

Jan. 9, 1996.

On Appeal from the United States District Court, for the Western District of Kentucky, No. 94-00360; Charles M. Allen, District Judge.

W.D.Ky.

REMANDED.

Before: LIVELY, NELSON and SUHRHEINRICH, Circuit Judges.

SUHRHEINRICH, Circuit Judge.

Defendants Jerry Lovitt, commissioner of the Kentucky state police, Christopher Gorman, Kentucky's attorney general, and Ann McClure, a clerk at a local state police post,[1] appeal from the district court's preliminary

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[1] Plaintiffs concede that McClure is not a proper defendant. *See* Ky.Rev.Stat.Ann. §§ 189.635(1) and 61.870(5) (Baldwin Supp.1995). Subsequent to the filing of this appeal, the district court dismissed McClure.

injunction enjoining enforcement of Act of April 11, 1994, 1994 Ky.Rev.Stat. & R.Serv. 478 (Baldwin) ("Senate Bill 351"). Subject to certain exceptions, Senate Bill 351 amends Ky.Rev.Stat.Ann § 189.635 (Baldwin Supp.1995) to restrict access to state-maintained motor vehicle accident reports. Plaintiffs are eleven individuals who seek to use these reports to solicit clients. The district court granted plaintiffs' motion for preliminary injunction on the ground that Senate Bill 351 violates the First Amendment.

Defendants raise several issues on appeal, including: (1) whether plaintiffs have presented a justiciable claim; (2) whether defendants were given adequate notice and opportunity to respond to the motion for preliminary injunction; and (3) whether the district court correctly ruled that Senate Bill 351 violates plaintiffs' First Amendment right to engage in commercial speech. We hold that plaintiffs presented a justiciable claim with respect to each of the separate provisions of Senate Bill 351. We conclude, however, that Lovitt was not given adequate opportunity to oppose plaintiffs' motion. Because this issue is dispositive, we do not reach defendants' other assignments of error. The preliminary injunction is DISSOLVED and the issue REMANDED to the district court.

BACKGROUND

Kentucky law requires motorists involved in certain kinds of accidents and/or law enforcement officers investigating such accidents to file motor vehicle accident reports with the Kentucky Department of State Police. Ky.Rev.Stat.Ann. § 189.635. These reports require that

certain information be disclosed, including the names and addresses of the operators of the vehicles involved, the results of chemical tests administered, and a description of the accident.

In 1994, Kentucky passed Senate Bill 351 which amended § 189.635 to read in relevant part as follows (the underlined portion is the amendment added by Senate Bill 351):

> (5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity in [sic] not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.
>
> (6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information

> in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

(Emphasis added.) The amendment became effective July 15, 1994.

Plaintiffs are eight attorneys and two chiropractors who have in the past used vehicle accident reports filed with the Kentucky Department of State Police to solicit clients. The eleventh plaintiff, James Bogard, is in the business of supplying information contained in the vehicle accident reports to lawyers and other professionals. All eleven claim an intent to continue their past practices.

In addition, Bogard alleges an intent to publish a newsletter entitled "The Accident Journal." He claims that the newsletter will contain copies of accident reports and that it will be marketed primarily to attorneys. Other than a mock-up presented to the district court, he has taken no steps towards the publication of this periodical.

Plaintiffs filed the instant action on June 6, 1994, at which time they also filed a motion for a preliminary injunction to enjoin enforcement of Senate Bill 351. The sole named defendant was Ann McClure, a clerk at a local state police post.[2] The district court held a hearing on plaintiffs' motion on July 14, 1994. Based on arguments made by McClure's attorney, the court concluded that the proper defendant was not McClure but Jerry

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[2] Lucy Richardson, Deputy General Counsel for the Justice Cabinet, has represented both McClure and Jerry Lovitt throughout their entire involvement in this litigation.

Lovitt, commissioner of the Kentucky state police. *See* Ky.Rev.Stat.Ann. §§ 189.635(1) and 61.870(5) (Baldwin Supp.1995).[3] As a result, the district court entered an order delaying adjudication of the merits of plaintiffs' motion until Lovitt had been joined as a party and properly served. Plaintiffs amended their complaint to add Lovitt and Christopher Gorman, Kentucky's attorney general. On August 2, 1994, after Lovitt and Gorman had been served but two days before they answered plaintiffs' amended complaint, the district court granted the motion for preliminary injunction.

At the preliminary injunction hearing, plaintiffs argued that Senate Bill 351 imposes a direct restraint on the speech of "news-gathering organizations" and, when read in its entirety, constitutes an indirect attempt to restrict direct-mail solicitation by attorneys and other business people. On the merits, McClure countered that Senate Bill 351 merely restricts access to government records and does not implicate the First Amendment. Alternatively, McClure contended that Senate Bill 351 is a

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[3] Ky.Rev.Stat.Ann. § 189.635 states in relevant part:

> (1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth.

Ky.Rev.Stat.Ann. § 61.870 states in relevant part:

> (5) "Official custodian" means the the [sic] chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records. . . .

justified restriction on commercial speech given Kentucky's substantial interest in protecting the privacy of motorists.

The district court characterized Senate Bill 351 as a content-based restriction on commercial speech subject to intermediate scrutiny. *See Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2375-76 (1995) (reiterating the test for content-based restrictions on commercial speech). It then concluded that § 189.635 as amended is not narrowly tailored to meet Kentucky's asserted privacy interest because the statute permits newspapers to publish the accident reports. Therefore, the district court enjoined enforcement of Senate Bill 351.

ANALYSIS

A. Standing and Ripeness

To establish standing, a plaintiff must allege and prove an actual or threatened injury, a causal connection between that injury and the defendant's conduct, and redressability. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir.1995). The issue of standing is a question of law reviewed de novo on appeal. *Id.*

Section 189.635(5) bars access to the motor vehicle accident reports except for, inter alia, the parties themselves, their attorneys, and insurers of those involved. Section 189.635(6) contains an added exception for "news-gathering organizations" provided that these organizations do not permit the information in the accident reports to be used for commercial speech purposes.

Defendants contend that there is no case or controversy as required by Article III of the U.S. Constitution because, at the time of the filing of suit, plaintiffs had not been refused access and had therefore not suffered any injury. Even if plaintiffs had standing to challenge § 189.635(5), defendants contend that plaintiffs did not have standing to challenge § 189.635(6) because Bogard, who is not currently a publisher and who has merely alleged an intent to publish, set forth only a hypothetical claim.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbit v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979). A plaintiff need not actually suffer the harm, however, provided that the injury is sufficiently certain to occur. *Id.; Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) (indicating that the harm must be "certainly impending"). This is especially true where First Amendment rights are implicated because of the fear that speech will be chilled before the law, regulation, or policy is enforced. *Greater Cincinnati,* 56 F.3d at 715-16; *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 760 (11th Cir.1991).

We hold that plaintiffs had standing to challenge § 189.635(5). Although plaintiffs initiated this action before Senate Bill 351 became effective, the alleged harm, i.e., the denial of access and the consequent restriction on speech, was virtually certain to occur. At the time of filing, Senate Bill 351 had already been enacted and would become effective in less than sixty days. Further, it is undisputed that plaintiffs had in the past obtained accident records and that, but for the amendment to

§ 189.635, they would continue to do so. In light of defendants' stated intent to enforce Senate Bill 351, we conclude that the harm alleged by plaintiffs was sufficiently imminent to satisfy the injury in fact element of standing with respect to § 189.635(5). *See Briggs v. Ohio Elections Comm'n,* 61 F.3d 487, 491-92 (6th Cir.1995) (standing to challenge election law exists where plaintiff intended to run for office in future and where the elections committee stated that plaintiff's past violation of the law would be used in any future investigation).

The closer question is whether Bogard has standing to challenge § 189.635(6). Standing requirements are relaxed in the context of the First Amendment, but a plaintiff must still allege an injury which is real and imminent and not conjectural or hypothetical. *Greater Cincinnati,* 56 F.3d at 716. The less likely a plaintiff is to engage in a proscribed activity, and/or the more vague his intentions, the less real and imminent the harm becomes. *See, e.g., id.* at 716 (no standing where plaintiff disavows intent to violate statute); *Hallandale Professional Fire Fighters,* 922 F.2d at 761-62 (public employees do not have standing to challenge a statute restricting speech where they fail to allege an intent to violate the statute or to state clearly what they intend to say). Arguably, Bogard has not suffered any greater harm than the public at large because he has yet to take any significant steps towards publishing his newsletter and therefore has not suffered the requisite injury in fact.

Bogard alleges an intention to publish a newsletter containing the accident reports. To the extent that § 189.635(6) prohibits this kind of publication, and thereby deters Bogard from becoming a publisher, he has

suffered a direct restriction on his freedom of speech. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630 (7th Cir.) (self-censorship caused by prescriptive statute constitutes a direct harm where there is a threat it will be enforced against plaintiff), *cert. denied*, 498 U.S. 959 (1990). Bogard cannot be faulted for failing to invest labor and capital in furtherance of his newsletter when, at the time of the suit, the venture would shortly become prohibited by law. Therefore, we hold that Bogard does have standing.

In addition, we must determine whether Bogard's challenge to 189.635(6) is ripe. Unlike standing, which involves who may bring suit, ripeness depends on whether the facts are sufficiently developed to permit adjudication. *Hallandale Professional Fire Fighters*, 922 F.2d at 760 n.3. Ripeness turns on a two-part test involving "the fitness of the issues for judicial determination and the hardship to the parties of withholding consideration." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C.Cir.1995) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)), *petition for cert. filed*, 64 U.S.L.W. 3298 (U.S. Oct. 16, 1995) (No. 95-620). A case is relatively more fit for judicial review if it involves few contingent future events and/or depends largely on matters of law. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir.1995). The customary ripeness analysis is relaxed in cases involving a facial challenge to a statute on First Amendment grounds.

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment

> claims ripe, often commenting directly on the special need to protect against any inhibiting chill.

Id. at 1500 (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3532.3 at 159 (2d ed. 1984)).

We conclude that Bogard's claim is ripe for review. As defendants themselves note, this case turns largely on matters of law and not on contingent matters of fact; at the heart of this controversy is whether § 189.635(6) violates the First Amendment. Granted, Bogard has taken few steps towards publishing his newsletter. The issues presented and their resolution, however, would not be any clearer had Bogard performed additional acts.

Further, failure to consider Bogard's claim imposes unnecessary hardship on Bogard. The question of hardship typically turns upon whether the challenged action creates " 'a direct and immediate' dilemma for the parties." *El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 496 (1st Cir.1992) (citation omitted). Here, the dilemma faced by Bogard is this: invest labor and capital in a venture which is currently prohibited by law, or make no such effort and suffer a restriction on his speech. Because the issue is largely one of law and because Bogard faces a current dilemma, we find that Bogard's challenge to § 189.635(6) is ripe for review.

B. Notice

Lovitt and Gorman argue that they were given inadequate opportunity to oppose plaintiffs' motion in violation of Rule 65(a) of the Federal Rules of Civil Procedure.

Plaintiffs contend that, as a practical matter, the interests of Lovitt and Gorman were adequately represented by McClure at the July 14, 1995 hearing. We review for abuse of discretion a district court's determination that the parties received notice of the preliminary injunction sufficient to satisfy Fed.R.Civ.P. 65(a). *Illinois v. Peters*, 871 F.2d 1336, 1340 (7th Cir.1989); *United States v. Alabama*, 791 F.2d 1450, 1458 (11th Cir.1986) (citing *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 302 (5th Cir.1978), *cert. denied*, 479 U.S. 1085 (1987 [sic])).

Rule 65(a) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." Fed.R.Civ.P. 65(a). This notice requirement implies "a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir.1991) (quoting *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 433 n.7 (1974)); *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir.1978) (Rule 65 "contemplates that the issuance of a preliminary injunction shall be upon notice to the adverse party and after a hearing. A hearing embodies the right to be heard on the controverted facts, as well as upon the law." (citation omitted)).

The requirements of Rule 65(a) are not mere procedural formalities. Rather, these requirements are grounded in the fundamental values of our judicial system. *Cf. Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990) (Rule 65(b)'s restriction on ex parte "temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be

heard. . . . " (quoting *Granny Goose Foods*, 415 U.S. at 439)). Thus, courts have not hesitated to dissolve a preliminary injunction issued without sufficient notice or opportunity to contest issues of fact or of law. *See, e.g., Western Water Management, Inc. v. Brown*, 40 F.3d 105, 109 (5th Cir.1994) (order modifying injunction invalid where adversely affected party not given notice that contempt hearing could result in modification of injunction); *Parker v. Ryan*, 960 F.2d 543, 545 (5th Cir.1992) (order freezing assets of the defendant's former wife, who was not a party to the action, invalid where formal notice of the hearing was received two business days prior to hearing).

In the case at bar, the district court concluded that Lovitt and not McClure was the proper person to defend Senate Bill 351. Neither party challenges this ruling on appeal. Therefore, Lovitt had a right to argue on his own behalf against the preliminary injunction pursuant to Fed.R.Civ.P. 65(a).

Although the district court recognized Lovitt as the proper defendant, it issued its order without permitting Lovitt to contest the injunction. Plaintiffs correctly note that the court withheld adjudication of the merits until after Lovitt had been served. But merely delaying adjudication is meaningless where, as here, the adversely affected party is not given the chance to argue his position. Because the district court recognized Lovitt's interest in the preliminary injunction but failed to afford Lovitt an opportunity to be heard, we conclude that the grant of the preliminary injunction was an abuse of discretion in violation of Rule 65(a).

Plaintiffs contend that Lovitt's interests were adequately represented by McClure. Specifically, they argue that McClure, in defending herself, put forth all of the relevant arguments in support of Senate Bill 351. According to plaintiffs, the fact that McClure and not Lovitt made these arguments is irrelevant because it is ultimately the state's interests which are at stake. Plaintiffs note that Lovitt's attorney, Lucy Richardson, was McClure's attorney at the preliminary injunction hearing. Plaintiffs further point out that the validity of Senate Bill 351 is largely a legal issue and does not involve facts unique to Lovitt.

All parties agree that the proper defendant is the commissioner of state police, who in this case is Lovitt. An injunction against McClure, a clerk at a local state police office, would be both improper and meaningless because she does not have authority to comply with the court order. Accordingly, McClure has less incentive to defend the validity of Senate Bill 351 than does Lovitt. In addition, because McClure is an improper party, she has different litigation strategies available to her. For example, one of McClure's first arguments at the preliminary injunction hearing was that she is an improper party, an argument which she has repeatedly put forth during the course of this litigation. In short, the interests of Lovitt and McClure are not so closely aligned that we will indulge in the fiction that Lovitt was constructively represented by McClure. The fact remains that Lovitt was simply not given an opportunity to oppose plaintiffs' motion for preliminary injunction and therefore the injunction must be dissolved.

At oral argument and in briefs filed subsequently, the parties disagreed as to whether Gorman is subject to the preliminary injunction and thus whether he was entitled to notice prior to the issuance of the court's order. In light of our decision to dissolve the preliminary injunction and remand for a new hearing, the issue is moot and therefore we do not address it.

CONCLUSION

We DISSOLVE the district court's preliminary injunction and REMAND the issue to district court for a new hearing. We express no opinion on the merits of this litigation or the appropriateness of a preliminary or permanent injunction.

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

COMMISSIONER, DEPARTMENT OF STATE POLICE, et al., Defendants.

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

JEFFERSON COUNTY, KENTUCKY, et al., Defendants.

JUSTICE CABINET, Department of State Police, et al., Plaintiffs,

v.

David KAPLAN, Defendant.

Nos. 3:94CV-360-A, 3:95CV-22-A.

United States District Court,
W.D. Kentucky.

June 3, 1996.

Donald L. Cox, Lynch, Cox, Gilman & Mahan, Louisville, KY; and David A. Friedman, Taustine, Post, Sotsky, Berman, Fineman & Kohn, Louisville, KY, for plaintiffs.

Barbara Jones, Office of General Council, Corrections Cabinet, Frankfort, KY; Lucy B. Richardson, KY, Justice Cabinet, Frankfort, KY; William B. Pettus, Office of the Atty. General, Frankfort, KY; John L. Arnett, Elizabethtown City Attorney Office, Elizabethtown, KY; N. Scott Lilly, First Assistant County Attorney, Louisville, KY, for defendants.

MEMORANDUM OPINION

ALLEN, Senior District Judge.

Plaintiffs in this action are eight attorneys, two chiropractors, and an individual who supplies information to lawyers and other persons regarding motor vehicle accidents. Plaintiffs challenge the constitutionality of KRS 189.635, as amended by Kentucky Senate Bill 351, and seek an injunction granting them access to vehicle accident reports which are filed with the Department of State Police. Defendants desire to keep the reports from those in plaintiffs' position, relying on the confidentiality features of KRS 189.635, as amended. Subsection 5 of the statute provides, in essence, that accident reports shall remain confidential subject to an exception that the Department of State Police may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. Subsection 5 of the amended Senate Bill 351 also provides that all other accident reports shall be confidential except when produced subject to a court order or subpoena or except for subsection 6. It further states that the report shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party.

Subsection 6 of Senate Bill 351, however, allows the report to be made available to a news-gathering organization which is not to distribute the report or allow its use or distribution for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report.

A close question is presented to the Court as to the constitutionality of the statutes challenged by the plaintiffs. There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994), and *Lanphere & Urbaniak v. State of Colorado,* 21 F.3d 1508 (10th Cir.1994). In addition, the decisions in *Moore v. Morales,* 843 F.Supp. 1124 (S.D.Texas 1994), and *Innovative Database Systems v. Morales,* 990 F.2d 217 (5th Cir.1993), hold that Texas may not prohibit chiropractors or attorneys from receiving access to motor vehicle accident reports on the grounds that they will use the information for financial gain. The Texas statute also prohibited chiropractors from directly soliciting patients or potential patients known to have been involved in motor vehicle accidents or work-related accidents, or who had been injured by another person. In *Moore v. Morales,* 843 F.Supp. 1124 (S.D.Tex.1994) Judge Hittner noted that Texas statutes allowed certain classes of people to obtain accident reports within 180 days while others could not. He therefore held that this statute was not reasonably related to the state's interest in protecting individual's privacy rights.

In *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994), the Court addressed a Georgia statute providing that it was unlawful for anyone to copy or inspect any records of a law enforcement agency concerning crimes or motor vehicle accidents for the purpose of commercially soliciting the victims or relatives of these individuals. Plaintiff Speer, an attorney licensed to practice in Georgia, filed an action seeking to enjoin enforcement of the statute on the grounds that it violated the First, Fifth and Fourteenth

Amendments. The lower court dismissed both the First Amendment and the Equal Protection challenges.

In reversing and remanding the action, the Eleventh Circuit Court of Appeals noted that "[s]tatutes that restrict commercial speech must directly advance a substantial government interest and the state bears the burden of justifying its restrictions. *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir.1991), aff'd, 507 U.S. 761, 113 S.Ct. 1792 [123 L.Ed.2d 543] (1993)." *Speer*, 15 F.3d at 1010. The *Speer* court also indicated that although it appeared likely that plaintiffs' commercial speech claims would prevail, the state was entitled to develop its interest. On remand, the District Court noted the statute's explicit permission of publication by news media, and rejected the State's claim that the statute protected privacy. *Speer v. Miller*, 864 F.Supp. 1294 (N.D.Ga.1994). The aim of the Georgia statute, like that challenged here, was not to keep information from becoming public, but to diminish the likelihood of a particular use of that information, i.e., commercial solicitation.

In *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508 (10th Cir.1994), a two to one decision, the Tenth Circuit affirmed the lower court's holding that a statute denying access to records of official actions and criminal justice records unless such person seeking the report signed a statement stating that the records would not be used for the direct solicitation of business for pecuniary gain was not violative of the First and Fourteenth Amendments. *Id.* at 1510-11, 1516.

While this Court chooses to follow the dissenting opinion of Judge Aldisert in *Lanphere*, it is important to analyze both the majority opinion and Judge Aldisert's dissenting opinion. The Colorado statute provided that no person could obtain a record of official actions in criminal justice records unless he or she signed a statement affirming that the records would not be used for the direct solicitation of business for pecuniary gain. The plaintiffs, who were two attorneys and a Director of a Drug and Alcohol Treatment Center, refused to sign the statement because they wanted to use the names and addresses to engage in direct mail advertising for the purpose of soliciting business for pecuniary gain. Prior to the bringing of the action, access to the records had been granted, as it had in the case at bar prior to the amendment of the applicable statutes.

The majority opinion held, first, that there is no constitutional right of access to public records, but did not end the analysis there, and went on to review the case under the principles asserted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 560-566, 100 S.Ct. 2343, 2347-2351, 65 L.Ed.2d 341 (1980). In that case the court set out a four-part test because the statute disadvantaged commercial speech. The first part of the test is whether the expression is protected by the First Amendment. In order to be protected it must concern lawful activity and not be misleading. The next question is whether the asserted governmental interest is substantial. Then, if both questions yield positive answers, the court must determine whether the regulation directly advances the governmental interest asserted, and fourth,

whether it is not more extensive than is necessary to serve that interest.

The *Lanphere* majority held that the commercial speech affected by the Colorado statute came within the protection of the First Amendment because direct mail advertising concerned lawful activity which would not necessarily be misleading. The majority then went on to hold that the interest of the state was the need to protect the privacy of those charged with misdemeanor traffic offenses and DUI. The court held that this was a substantial interest even though the identity of those charged might be available through local newspapers. The court stated, "even if the information is available to some degree through other sources, the state's interest in not aiding in the dissemination of the information for commercial purposes remain." *Lanphere*, 21 F.3d at 1514. The majority also held that there was a substantial state interest in lessening the danger of solicitation abuse. The court held that the statute advanced the State's interests in protecting privacy in a direct manner. Finally, the court held that the regulation was not more extensive than was necessary.

In his dissenting opinion, Judge Aldisert did not cite the *Central Hudson* case so strongly relied upon by the majority. Instead, he approached the resolution of the case by analyzing the teachings of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Judge Aldisert cites that case as authority in dealing with the claim of First Amendment rights to criminal proceedings. There are two complementary considerations. The first is whether there has been a "tradition of accessibility" which implies a favorable judgment of

experience. Secondly, "the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question."

Judge Aldisert held that where criminal records are concerned, there is a presumption of public access to criminal trial documents and criminal proceeding documents, and also held that public access to the State's criminal justice record add to the judicial process.

While the case at bar does not involve criminal proceedings and the records of them, Judge Aldisert observed that the State of Colorado had not attempted to prohibit the publication of the names of those involved in criminal proceedings in the local newspapers. He stated that a prohibition against the newspaper's using such information would be a violation of the First Amendment, but then stated, "The statute is far too underinclusive to protect the privacy interests of those arrested for this offense." 21 F.3d at 1519. Judge Aldisert pointed out, "the issue is . . . whether the State has the power to place off limits to certain sectors of society records which hitherto been open to all." 21 F.3d at 1519.

While the case at bar differs somewhat from *Lanphere*, it is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the

State asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers. The Court realizes that the majority opinion in *Lanphere* and the dissenting opinion differ as to their opinion about the effect of the newspapers having information and publishing it while it is not made available to attorneys and others who want to use it for a commercial use.

In conclusion, this is a very close case, but we believe that the dissenting opinion in *Lanphere*, together with the opinions in *Speer v. Miller*, 15 F.3d 1007 (11th Cir.1994), and *Moore v. Morales*, 843 F.Supp. 1124 (S.D.Tex.1994), are authority for our holding that the statute is unconstitutional. In reaching that decision we realize that direct attorney solicitation by mail of accident victims or similar solicitation by health practitioners may be offensive to some of the recipients but this fact does not justify a ban on mail solicitation. *See Shapero v. Ky. Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). The Court recognizes that since its original decision in the case at bar the Supreme Court has decided *Florida Bar v. Went For It, Inc.*, ___ U.S. ___, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) holding that the Florida Bar Association may prevent its attorneys from soliciting accident victims for a period of thirty days. That case, however, involved only a regulation by the State Bar and the efforts of that Bar to protect injured Floridians from invasive conduct from lawyers. The question of access to public records was not directly presented in that case.

The Court will enter a judgment consistent with this opinion.

JUDGMENT

On motion of the plaintiffs, and the Court being sufficiently advised, defendants are hereby preliminarily and permanently enjoined from enforcing the 1994 amendments to KRS 189.635 and KRS 61.874, et seq., and from enforcing KRS 438.065.

This is an appealable judgment, and there is no just cause for delay.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN AMELKIN, C.D., et al.,

Plaintiffs,

Civil Action No.
C94-0360-L(A)

v.

ANN McCLURE, Document Custodian
Kentucky State Police, et al.,
Defendants.

MEMORANDUM OPINION

Plaintiffs are eight attorneys, two chiropractors, and an individual who supplies information to lawyers and other persons regarding motor vehicle accidents. At issue is KRS 189.635, as amended by Kentucky Senate Bill 351 ["Senate Bill 351"][1] Plaintiffs challenge the amended statute as unconstitutional under the First, Fifth, and Fourteen Amendments. Following a hearing on plaintiffs' motion for a preliminary injunction, Fed. R. Civ. P. 65, as well as subsequent service on the Commissioner of the Department of the State Police, Jerry W. Lovitt,[2] and on the Attorney General of the Commonwealth of Kentucky, Christopher Gorman,[3] the action was submitted for

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[1] Senate Bill 351 was enacted March 30, 1994; its amendments to KRS 189.635 became effective July 16, 1994.

[2] Regarding execution of service on Commissioner Lovitt, *see* Declaration of Server, Rodney J. Harris, July 15, 1994.

[3] Regarding execution of service on Attorney General Gorman, *see* Declaration of Server, Jennifer L. Faith, July 19, 1994.

decision on the merits. For the reasons set forth below, plaintiffs' motion for a preliminary injunction will be granted.

KRS 189.635 governs "vehicle accident reports by operators, law enforcement officers, and agencies. Subsection (5) of the statute provides as follows:

> [a]ll accident reports filed with the Department of State Police . . . shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident.

As amended by Senate Bill 351, subsection (5) also provides that:

> [a]ll other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

Senate Bill 351 also amends KRS 189.635 by adding subsection (6), which provides as follows:

> [t]he report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or

> distribution, for a commercial purpose other than the news-gathering organizations publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

KRS 189.635 as amended.

The plaintiffs who are attorneys argue they have a constitutional right to see the accident reports and to solicit business from those persons involved in such accidents. Likewise, the plaintiffs who are chiropractors contend they are constitutionally entitled to know the names of the victims of accidents in order that they may offer to furnish services to them. Finally, plaintiff James Bogard, a business person who furnishes certain types of information to lawyers and other businesses, including motor vehicle accident reports, also claims similar constitutional rights.

On the merits, the Commonwealth argues it has the right to deny access to the accident reports because such denial advances the privacy interests of those involved in vehicular accidents.

In *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993) (*reh'g denied* June 16, 1993), a Texas statute provided, in relevant part, that:

> [a] person who has possession of crime victim or motor vehicle accident information that the person obtained or knows was obtained from a law enforcement agency may not use the information to contact directly a person who is a crime

> victim or who was involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business from the person or family member.

Id. at 219.

The statute also prohibited the selling of such information to other persons for financial gain. *Id.* In addition, it prohibited chiropractors from directly soliciting patients or potential patients known to have been involved in motor vehicle or a work-related accidents [sic] or who had been injured by another person. *Id.*

The *Morales* Fifth Circuit affirmed the lower court, holding that although Texas has an interest in " 'promoting the ethical standards that are necessary in its licensed professions, particularly in the legal profession,' " *id.* at 221, that "very substantial interest" did not justify "a total ban on the use of lawfully obtained, public information to contact any person who was recently involved in an motor vehicle accident or who has been the victim of crime . . . ." Such a ban is "too broad a prohibition to prevent the perceived evil." *Id.* The *Morales* Court further held that "an outright ban on the sale of public information, with no regard for the truth of the information, [was] too broad a means of effectuating the intended purpose of the law." *Id.* at 222.

In *Moore v. Morales*, 843 F.Supp. 1124 (S.D. Tex. 1994), a Texas statute prohibited attorneys, chiropractors, physicians, and other professionals licensed by the state "from sending any written communications to targeted potential clients with the intent of obtaining professional employment within thirty days of an accident, criminal

arrest, or the filing of a civil lawsuit." *Id.* at 1126. The Texas legislature also amended the Uniform Traffic Act, which prohibited release of accident reports for 180 days from the date of accident. The amendments, however, allowed certain designated classes of persons, including insurance agencies and the news media to obtain these reports within 180 days of the accident. *Id.* In addition, the Texas Uniform Traffic Act acted in concert with the Texas Barratry [sic] Statute, the latter providing that "accident reports 'must include a means of designating whether an individual involved in an accident does or does not desire to be contacted by persons seeking professional employment . . . .' " *Id.*

In striking the amendments as unconstitutional, District Judge Hittner noted that because the amendments allowed certain classes of people to obtain accident reports within 180 days while other classes could not, the regulations were not reasonably related to the state's interest in protecting individuals' privacy rights. *Id.* at 1129.

As stated by Judge Hittner, for these types of regulations to withstand constitutional scrutiny as mandated by the Supreme Court, the state bears

> the burden of proving that [its] interests are substantial state interests, that the State's interest is directly advanced by the regulations and that there is a reasonable fit between the State's interest and the regulation [citations omitted]. In this case, each of the interests articulated by the State of Texas . . . has been addressed by the

> Supreme Court and rejected as not comprising a 'substantial state interest.'

Id. at 1127.

In *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), Georgia passed a statute providing that it was unlawful for anyone to copy or inspect any records of a law enforcement agency concerning crimes or motor vehicle accidents for the purpose of commercially soliciting the victims or relatives of these individuals. Plaintiff Speer, an attorney licensed to practice in Georgia, filed an action seeking to enjoin enforcement of the statute on the grounds that it violated the First, Fifth and Fourteenth Amendments. The lower court dismissed both the First Amendment and the Equal Protection challenges.

In reversing and remanding the action, the Eleventh Circuit Court of Appeals noted that "[s]tatutes that restrict commercial speech must directly advance a substantial government interest and the state bears the burden of justifying its restrictions. *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988); *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *aff'd*, ___ U.S. ___, 113 S.Ct. 1792 (1993)." *Speer*, 15 F.3d at 1010. The *Speer* Court also indicated that although it appeared likely that plaintiffs' commercial speech claims would prevail, the state was entitled to develop its interests. *Id.*

In *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508 (10th Cir. 1994), a two to one decision, the Tenth Circuit affirmed the lower court's holding that a statute denying access to records of official actions and criminal justice records unless such person seeking the report signed a statement stating that the records would not be

used for the direct solicitation of business for pecuniary gain was not violative of the First and Fourteenth Amendments. *Id.* at 1510-11, 1516.

In a persuasive dissent by Senior Circuit Judge Aldisert, he noted that "Colorado concedes that all of the information denied to Appellants by the statute is accessible to them through the El Paso County News, the official weekly newspaper for El Paso County, Colorado." *Id.* at 1518. Indeed, Judge Aldisert continued:

> [t]he State's interest in preserving the right of privacy of those arrested for driving under the influence is not so compelling that [it has] attempted to prohibit the publication of the names of these individuals in the El Paso County News. No citation is necessary to indicated [sic] that any attempt to prevent publication of this information by the news media would be a violation of prior restraint precepts of the First Amendment. The statute is far too underinclusive to protect the privacy interest of those arrested for this offense.

Id. at 1518-19.

It is axiomatic that advertising by lawyers now falls within a category of constitutionally protected commercial speech. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988). Thus, according to Judge Aldisert, the issue is:

> not whether [the State] is obliged to provide a client bases [sic] to the Appellants. . . . Rather, the question is to what extent may [the State] deny public access, irrespective of the motivation for the access, so long as the motivation is not for any unlawful purpose. In my view, a

> desire for pecuniary gain in the world's strongest capitalistic society operating under a democratic political system has not yet been declared unlawful, offensive, or unconstitutional.

Lanphere, 21 F.3d at 1519.

In the case at bar, just as in *Lanphere*, the state's purported interest in preserving individual privacy is undercut by allowing the news media access to the information.

In conclusion, this Court is of the opinion that the reasoning and decisions in the two *Morales* opinions and the *Speer* opinion coupled with the dissenting opinion in *Lanphere* are persuasive.

A judgment in accordance with this opinion will be entered this day.

Date: August 2, 1994

/s/ Charles M. Allen
CHARLES M. ALLEN,
Senior Judge

cc: Counsel of Record
(ENTERED Aug. 2, 1994)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN AMELKIN,
C.D., et al.,

Plaintiffs,

Civil Action No.
C 94-0360-L(A)

v.

ANN McCLURE,
Document Custodian
Kentucky State Police, et
al.,

Defendants.

JUDGMENT

This action having come before the Court on plaintiffs' motion for a preliminary injunction, Fed. R. Civ. P. 65, and the Court after having considered the parties' oral arguments and memoranda having entered this day its memorandum opinion, accordingly, after due consideration with the Court fully advised,

IT IS ORDERED AND ADJUDGED that Senate Bill 351 to the extent that it denies access to motor vehicle accident reports sought by attorneys, chiropractors, and other persons be, and hereby is, found unconstitutional.

IT IS FURTHER ORDERED that defendants with custody over such motor vehicle accident reports shall provide access to said reports sought by attorneys, chiropractors, and other persons seeking access.

IT IS FURTHER ORDERED that a bond in the amount of $10.00 (ten dollars) be, and hereby is, imposed.

This is an appealable order, and there is no just cause for delay.

Date: August 2, 1994

/s/ Charles M. Allen
CHARLES M. ALLEN,
Senior Judge

cc: Counsel of Record

(Entered Aug. 2, 1994)

Case No: 96-5942

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 2000)

STEPHEN AMELKIN, et al.,

Plaintiffs-Appellees,

CITY OF LOUISVILLE,

Division of Police
Plaintiff

v.

ANN McCLURE, et al.,

Defendants-Appellants

JUSTICE CABINET, Department of State Police;

Plaintiff-Appellant

JEFFERSON COUNTY, KENTUCKY;

Defendant

LOUISVILLE & JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

Amicus Curiae

BEFORE: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellees,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENTS I-X – BILL OF RIGHTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[LOGO]

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION 1994

SENATE BILL NO. 351
(AS ENACTED)

WEDNESDAY, MARCH 30, 1994

AN ACT relating to motor vehicle accidents.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1 KRS 189.635 is amended to read as follows:

(1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event

the operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. ***All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the***

parents or guardians of a minor who is party to the accident and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

(6) *The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.*

[SEAL]

TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

CHRIS GORMAN
ATTORNEY GENERAL

P.O. BOX 2000
FRANKFORT, KY 40602

94-ORD-145

December 9, 1994

In re: David Kaplan/Louisville Division of Police

OPEN RECORDS DECISION

This matter comes to the Attorney General on appeal from the Louisville Division of Police's denial of Mr. David Kaplan's request to let a member of his law office inspect and write down information listed on accident reports without being charged any fee for copying the information, which he has stated will be later used for "commercial purposes" as defined by the Open Records Law. KRS 61.870(4).

On behalf of the Louisville Division of Police, Mr. Paul V. Guagliardo, Senior Attorney, Department of Law, City of Louisville, denied Mr. Kaplan's request. Mr. Guagliardo's response, in summary, set forth the following facts in support of his denial:

1. Mr. Kaplan intends to use the information taken from the accident reports for commercial purposes;

2. Under KRS 189.635, the Kentucky Justice Cabinet, Department of State Police, is responsible for maintaining a reporting system for all vehicle accidents in the Commonwealth;

3. The Louisville Division of Police is required by KRS 189.635 to file accident reports with the Department of State Police. The accident reports are completed on State Police forms;

4. The Department of State Police is the "official custodian" of the accident reports;

5. The Division of Police serves as a conduit to transmit the accident report forms to the State Police. The Division is the custodian of its own agency copy;

6. Pursuant to KRS 189.635, all accident reports are confidential;

7. Pursuant to KRS 61.878(1)(a), (k) and (1), all or portions of each accident report would be exempt from public disclosure.

In addition to the facts set forth above, Mr. Guagliardo, in his agency response, states that an [sic] August 2, 1994, judgment in *Amelkin v. McClure*, U.S. District Court in Louisville, declared Senate Bill 351 (which amended KRS 189.635) unconstitutional to the extent it denies access to the accident reports sought by attorneys, chiropractors, and other persons. Although the Louisville Division of Police was not enjoined (or mandated) by the action with regard to KRS 189.635, the Division, out of deference to the District Court's finding of partial unconstitutionality of KRS 189.635, decided not to withhold the accident reports from "attorneys, chiropractors and other persons" seeking access to the reports.

Because Mr. Kaplan requested to inspect and use information for commercial purposes, the Division calculated an approximate cost of $5.00 per copy to create, produce, and copy an accident report.

Mr. Kaplan requested that he or a member of his staff be permitted simply to look at the report and make notes from the accident reports without being charged any fee.

The Division of Police denied this request, stating that since the information was to be used for commercial purposes, Mr. Kaplan would be charged $5.00 per accident report to view the records. There would be no additional charge to obtain a photocopy of any accident report he had inspected.

The first issue presented in this appeal is whether the Louisville Division of Police violated the Open Records Act by not allowing Mr. Kaplan or a member of his law firm to inspect and write down information listed on the accident reports to be used for commercial purposes without being charged a fee.

Because of legislation passed by the 1994 General Assembly, an additional issue is raised which must be addressed by this decision. That issue is whether it was proper for the Louisville Police Division to make available the accident reports for public inspection in light of legislation passed by the 1994 Kentucky General Assembly. We address this second question first.

In 1994, the General Assembly amended KRS 189.635(5) so that it now provides:

> All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. *All other accident reports*

> *required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.*

(Emphasized language added by 1994 Act.)

Under KRS 189.635(5), the accident reports are confidential and exempt from public disclosure except under limited circumstances set out therein. Mr. Kaplan does not claim he falls under these limited circumstances.

KRS 61.878(1)(1) provides in pertinent part:

> (1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . .
>
> > (1) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

This office has previously held that the custodian of the records of a public agency may allow inspection of all records in his custody regardless of whether the records may be exempt by their nature under the provisions of KRS 61.878 *unless* the records come under the exemptions provided for by KRS 61.878(k) and (1). Those exemptions are mandatory and exclude from public inspection public

records or information the disclosure of which is prohibited by federal law or regulation or by enactment of the General Assembly. OAG 79-275; OAG 91-132.

Accordingly, the Louisville Division of Police's action in making the accident reports available for public inspection was improper as such records are confidential and the disclosure of the records or information contained therein is clearly prohibited by KRS 61.878(1)(1) and KRS 189.635(5).

The fact that the U.S. District Court has declared a portion of KRS 189.635 unconstitutional and that the case is currently before the U.S. Court of Appeals for the Sixth Circuit does not alter this conclusion. Until such a holding is final and it is shown that such holding is controlling on the facts presented herein, there is a presumption that the statute is constitutional.

The other issue on this appeal is whether the Division of Police violated the Open Records Act by not allowing Mr. Kaplan to inspect and hand-copy information in the accident reports, to be used for commercial purposes, without paying a fee.

The 1994 General Assembly amended the Open Records Act by allowing public agencies to prescribe a fee for making copies of nonexempt public records which are requested for commercial purposes. KRS 61.874(4). The fee may be based on one or both of the following as set forth in KRS 61.874(4)(c):

> 1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of public records.

Thus, it is clear the General Assembly intended that public agencies assess a reasonable fee for copying public records to be used for commercial purposes.

However, KRS 61.874(1) specifically provides that "upon inspection, the applicant shall have the right to make abstracts and memoranda thereof." The Open Records Act does not address the circumstance of whether a fee may be charged for inspection and the writing down of information contained in the public record to be used for a commercial purpose. Unless the public agency can demonstrate some actual cost to the agency associated with allowing an individual to exercise his right to inspect and make an abstract of a public record, for commercial purposes, no fee can be charged. Thus, under the facts presented, the Division of Police could not charge a fee.

Mr. Kaplan and the Louisville Division of Police may challenge this decision by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882.

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